NO. 48540-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Appellant

v.

WILLIAM R PIPPIN, Respondent

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.15-1-02147-8

BRIEF OF APPELLANT

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ISSUES PRESENTED

I. **Whether the doctrine of *stare decisis* requires a trial court follow a Ninth Circuit decision.**

II. **Whether an individual has a reasonable expectation of privacy in a tent-like structure erected on public property on the side of a public road in downtown Vancouver in violation of the law.**

III. **Whether law enforcement intruded upon Pippen's "private affairs" by lifting the edge of the tarp to peer inside his tent-like structure that was erected on public property on the side of a public road in downtown Vancouver in violation of the law.**

IV. **Whether the evidence found by police was admissible pursuant to the plain view exception.**

V. **Whether officer safety justified a cursory intrusion into Pippen's "private affairs" after he failed to comply with officers' directions to exit from the tent-like structure.**

STATEMENT OF THE CASE

William Pippen (hereafter 'Pippen') was charged by information with Possession of a Controlled Substance – Methamphetamine. CP 3. The charges arose from a contact police had with Pippen on November 2, 2015. CP 2. Pippen was sleeping underneath a tarp structure he had erected on the side of a road in downtown Vancouver. CP 2; RP 27, 31. Police found methamphetamine in his possession. CP 2. While his case was pending, Pippen filed a motion to suppress the evidence found by police during his contact with them. CP 11. The trial court held a hearing during which the State presented the testimony of two officers who had contact with Pippen on that date. RP 9-70. The trial court entered an order suppressing evidence on December 23, 2015 and findings of fact and conclusions of law on January 11, 2016. CP 25, 34-41. The trial court dismissed the case. CP 24. The State filed the instant appeal. CP 27, 29.

A. UNLAWFUL CAMPING ORDINANCE

Up until October 2015, the City of Vancouver Municipal Code prohibited camping at any time on public land. Former VMC 8.22.040 made it unlawful for any person to camp, occupy camp facilities for purposes of habitation, or use camp paraphernalia in any park, street or publicly owned or maintained area. In August 2015, the City of Vancouver ceased enforcing this law in response to a Statement of Interest

the United States Department of Justice filed on August 8, 2015 in the federal district court case of *Bell v. City of Boise et al.*, No 1:09-cv-540, 2014 WL 3547224 (D. Idaho July 16, 2014) *recaptioned Martin v. City of Boise,* No. 1:09-cv-540, 2015 WL 5708586 (D. Idaho Sept. 28, 2015). The Statement of Interest in that case argued that making it a crime for the homeless to sleep in public unconstitutionally punished individuals for being homeless. The City of Vancouver soon amended the unlawful camping ordinance to remedy the issues addressed in the Statement of Interest. On October 21, 2015, the new version of the unlawful camping ordinance went into effect. Current VMC 8.22.040 permits camping on public land between 9:30 p.m. and 6:30 a.m., but continues to prohibit it at all other times. Between August 2015 and late October 2015, the City of Vancouver did not enforce the unlawful camping ordinance. After the implementation of the new ordinance, police efforts began to inform campers and homeless of the change in the ordinance and upcoming enforcement.

B. SUPPRESSION HEARING EVIDENCE

Officer Tyler Chavers is a police officer with the City of Vancouver. RP 9-10. Officer Chavers works patrol, focusing on community outreach and ongoing neighborhood livability issues. RP 10. As long as Officer Chavers has worked in Vancouver, there has been an

unlawful camping ordinance. RP 10-11. A change occurred in mid-October 2015, which made it legal to camp between the hours of 9:30pm and 6:30am. RP 11. For several months prior to the change in the City ordinance, the unlawful camping law was not being enforced. RP 11. After the new ordinance went into effect, law enforcement first documented campsites and provided notice of the ordinance and the need for individuals to comply by the following week. RP 13. Then, when officers would come into contact with someone who was unlawfully camping, they would determine if the individual had previously been contacted and warned about the change in the law, and if the person had, the officers would issue a citation for unlawful camping. RP 14-15. Many officers went around a certain area near downtown Vancouver over a four or five day time period to warn people of the ordinance, and inform them that a cleanup of the unlawful campsite was going to occur in a few days. RP 14-17.

The particular area that Officer Chavers visited with other officers during this time period had received multiple trespass complaints, especially by the owner whose fence line was on the edge of the camp that had been growing. RP 19. Between October 29, 2015 and November 2, 2015 law enforcement officers attempted contact with those occupying the 80 to 100 campsites that were unlawfully on public premises in downtown

Vancouver area. RP 20-24. The officers were informing the individuals of the change in law and that enforcement was going to begin soon, along with the cleanup set to occur in a few days. RP 20. Pippen's structure was present on October 29, 2015 and police officers left notice of the new ordinance and the cleanup that was set to happen in a few days affixed to the outside of Pippen's tarp. CP 36.

Officer Chavers was again in the area making contact with those unlawfully camping on November 2, 2015. RP 15. Officer Chavers made contact with Pippen at that time. RP 15. When Officer Chavers contacted Pippin on November 2, 2015, his intent was to determine whether he had previously been contacted about the ordinance change and unlawfulness of his camping. RP 15. Pippin's tarp structure was located along a guardrail that runs along the road, between the guardrail and the fence of a private property. RP 27; 31. The tarp was draped off of the fence and over the guardrail. RP 31. At approximately 10:35a.m., four full hours after City ordinance prohibited any camping on public property, officers contacted Pippen in his tarp structure on public property in downtown Vancouver. RP 31. Officers verbally called out, from outside Pippen's structure, identifying themselves as police, asking if anyone was awake inside. RP 31. They received no response. RP 31. One of the officers then rapped his hand on the outside of the tarp, again calling out for anyone to wake up,

asking if anyone was there. RP 32. A male voice called out. RP 32. The officers then asked if he was alone. RP 32. The male responded that he was alone. RP 32, 65. The officers said the person needed to come out so they could discuss the camping issue. RP 32. The officers could hear movement underneath the tarp. RP 33. As time passed the officers had concerns for their safety. RP 33. Officer Chavers was concerned for the possibility of weapons as there had been calls to this camping area for assaults, including individuals arming themselves with bike locks, camping implements, links of chain, etc. RP 35. As it was taking longer than usual for the person inside the tarp structure to respond and come out at the officers' request, the officers grabbed the bottom of the tarp and lifted it up. RP 34.

As the officer lifted the tarp, Pippen was beginning to sit up from a prone position, in a makeshift bed of a sleeping bag and tarp. RP 36-37. Pippen got out of his bed and as he did so, Officer Chavers saw a large bag of what appeared to him to be crystal methamphetamine. RP 37. None of the officers manipulated any of Pippen's belongings under the tarp at this point. RP 41. Based on observing the methamphetamine in plain view, the officers arrested Pippen. RP 41.

Officer Chavers' report on this subject said:

> Officer Donaldson announced our presence verbally, had a camouflaged tarp set up in a makeshift shelter.
>
> A male voice responded that he was just waking up, and would come out in a moment. Officer S. Donaldson asked the male if this was his bed and tarp. The male responded that it was. I asked if he was alone or if anyone was with him. He told us he was alone and he would be out in a moment.
>
> Several seconds went by and we could hear the male moving about under the tarp. Officer S. Donaldson reached down and lifted the camouflage tarp up to help the male who sounded very tired and/or intoxicated.

RP 43-44. Officer Chavers did not include anything about officer safety in his report. RP 45.

Officer Donaldson of the Vancouver Police Department canvassed the illegal campsite on October 29, 2015. RP 59. On that date he saw Pippen's structure, but did not make contact with anyone in or at the structure. RP 60. However, Officer Donaldson recalled that a notice was left, inside a waterproof envelope, safety pinned to Pippen's tarp. RP 60. Officer Donaldson returned to the area on November 2, 2015 and observed other signs still in the area. RP 60. In approaching Pippen's tarp structure on November 2, 2015 with Officer Chavers, Officer Donaldson's intent was to identify individuals associated with the structure and warn them that their property was going to be picked up in a cleanup happening the following day. RP 60. Officer Donaldson approached the tarp structure

and announced verbally he was a police officer. Officer Donaldson heard a male voice in response, and Officer Donaldson told him to exit the structure so they could talk about the camping ordinance. RP 61. There was no answer from the male inside the structure to this. RP 61. Officer Donaldson then heard some wrestling around inside; the officer again called out that the male needed to exit immediately to talk about the camping ordinance. RP 61. The male inside did not comply. RP 61. Officer Donaldson worried that the person inside the tarp structure may be going for a weapon. RP 61. Officer Donaldson believed they waited about five minutes for the male inside to comply with their commands to exit. RP 62. Officer Donaldson called out that he was going to lift the side of the tarp/tent structure so he could see inside, and Pippen responded that that was okay. RP 62. Upon opening the tarp structure, Officer Donaldson saw Pippen lying on his makeshift bed. RP 62.

No other witnesses testified at the hearing.

Vancouver Municipal Code 8.22.040(A) provides:

> Unlawful Camping.
>
> A. During the hours of 6:30 a.m. to 9:30 p.m., it shall be unlawful for any person to camp, occupy camp facilities for purposes of habitation, or use camp paraphernalia in the following areas, except as otherwise provided by ordinance or as permitted pursuant to Section 8.22.070 of this ordinance:

1. Any park;
2. Any street; or
3. Any publicly owned or maintained parking lot or other publicly owned or maintained area, improved or unimproved.

Vancouver Municipal Code 8.22.060 provides:

> Penalty for violations.
>
> Violation of any of the provisions of this chapter is a misdemeanor. Any person violating any of the provisions of this chapter shall, upon conviction of such violation, be punished by a fine of not more than one thousand dollars or by imprisonment not to exceed ninety days, or by both such fine and imprisonment.

ARGUMENT

I. The trial court erred in entering findings of fact that were not based on any evidence admitted at the suppression hearing.

This court reviews a trial court's findings of fact following a suppression hearing for substantial evidence. *State v. Hill*, 123 Wn.2d 641, 647, 870 P.2d 313 (1994); *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999). Substantial evidence is evidence that is sufficient to persuade a fair-minded, rational person of the truth of the finding. *Hill*, 123 Wn.2d at 644. A trial court's findings of fact are reviewed under the "clearly erroneous" standard. *State v. Evans,* 80 Wn. App. 806, 811, 911 P.2d 1344 (1996) (citing *State v. Allert*, 117 Wn.2d 156, 163, 815 P.2d 752 (1991). "Findings are clearly erroneous 'only if no substantial evidence supports

[the trial court's] conclusion.'" *Evans*, 80 Wn. App. at 812 (citing *State v. Grewe*, 117 Wn.2d 211, 218, 813 P.2d 1238 (1991); *State v. Perez*, 69 Wn. App. 133, 137, 847 P.2d 532, *rev. denied*, 122 Wn.2d 1015 (1993)). Findings of fact are reviewed for substantial evidence. *Wenatchee Sportsmen Ass'n v. Chelan County,* 141 Wn.2d 169, 176, 4 P.3d 123 (2000). Substantial evidence is a "quantum of evidence sufficient to persuade a rational fair-minded person the premise is true." *Sunnyside Valley Irrigation Dist. V. Dickie*, 149 Wn.2d 873, 879, 73 P.3d 369 (2003) (citing *Wenatchee, supra*).

The trial court erred in entering several findings of fact that were not based on *any* evidence admitted during the suppression hearing. The trial court erred in entering findings of fact number 7, number 8 and number 9, as these findings are not based on any evidence in the record. The only evidence presented at the suppression hearing was the testimony of Officer Chavers and Officer Donaldson, and the photographs admitted. No other witnesses testified and no other evidence was admitted. There is no mention in the record through questioning of either Officer Chavers or Officer Donaldson that there were "portable restrooms" present at the unlawful camping site where Pippen was found to be unlawfully camping. Neither witness testified to this, nor does any other evidence support it.

This finding is clearly not based on anything admitted into evidence and thus cannot be found to be supported by substantial evidence.

The trial court erred in entering finding of fact number 8 for the same reason. No witness testified that "agencies were coming down and providing huts to the homeless and aiding them." No other evidence supported this finding either. There is no evidence in the record that any agencies provided anything to anyone unlawfully camping. There is simply no evidence of this, and thus the trial court erred in entering this finding.

The trial court also erred in entering finding of fact number 9 because there was no evidence in the record that "some members of this community were expressing their right to bear arms and were walking around like a security force." Neither Officer Chavers no Officer Donaldson testified that there was any "security force" or that any person involved in unlawful camping in the area where Pippen was found was asserting their Second Amendment right to bear arms. There is simply no evidence in the record to support this finding. The trial court clearly erred in entering this finding.

Furthermore, this type of fact is not an appropriate subject for judicial notice under ER 201(b). ER 201(b) provides that a judicially noticed fact must be one not subject to reasonable dispute in that it is

either generally known within the jurisdiction of the trial court or capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. It appears the trial court judge included facts in his findings that he knew from his own, personal observations. This is an improper subject on which to take judicial notice. The judge made himself a witness to the proceedings, yet was not subject to cross-examination. In *Vandercook v. Reece*, 120 Wn.App. 647, 86 P.3d 206 (2004), the Court found that it was not proper for a judge to take judicial notice of facts he remembered from testimony at a prior trial. The judge's memory was subject to reasonable dispute and was not a proper subject for judicial notice. *Id.* The same is true here. The trial court judge's observations and perceptions are subject to dispute and are not a proper type of fact for which the court may take judicial notice.

As the trial court made extra-judicial findings of fact that were in no way supported by the evidence, this Court should strike these three findings from the trial court's findings and in no way rely upon them in analyzing the issues presented.

II. The trial court erred in finding that federal Ninth Circuit precedent is controlling, binding, and supersedes State precedent and other federal precedent.

The trial court found that *U.S. v. Sandoval*, 200 F.3d 659 (9th Cir. 2000) controlled its analysis of this case because it "overrode" *State v.*

Cleator, 71 Wn.App. 217, 857 P.2d 306 (1993) and *U.S. v. Rigsby*, 943 F.2d 631 (6th Cir. 1991). Federal Court of Appeals case law is not binding on our courts on this subject, and the trial court erred in finding that it was bound by *Sandoval*, and it further erred in finding that a Ninth Circuit case is more controlling than a Sixth Circuit federal case. No circuit is binding on State courts, and no one circuit is inherently more persuasive than another.

While in resolving federal questions, the decision of the various federal appellate courts may be persuasive, they are not binding upon Washington courts. *Home Ins. Co. of New York v. N. Pac. Ry. Co.,* 18 Wn.2d 798, 808, 140 P.2d 507 (1943). In *State v. Glasmann*, 183 Wn.2d 117, 349 P.3d 829 (2015) our Supreme Court noted, "...the Ninth Circuit's decisions are not binding on this court...." *Glasmann*, 183 Wn.2d at 123. In fact, in that case, the Supreme Court chose not to follow a Ninth Circuit case that held the opposite of what prior state case law held. The Supreme Court additionally noted, "...we are unpersuaded by the Ninth Circuit's decision in *Brazzel*...." *Id.* at 126. And the Supreme Court concluded that "[i]t would undermine our role as an independent state court in our system of federalism if we overturned our precedent simply because it conflicted with a Ninth Circuit decision." *Id.* at 127.

Thus our State Supreme Court has made it clear: the Ninth Circuit does not control us. Our Supreme Court's strong adherence to its own precedent over federal opinions shows the preference for state court jurisprudence and thus the trial court's blanket determination that federal Ninth Circuit case law overruled State case law to the contrary was erroneous.

Furthermore, "the geographical location of the court issuing the opinion is of no moment." *S.S. v. Alexander*, 143 Wn.App. 75, 92, 177 P.3d 724 (2008). No Washington Court has held that opinions from the Ninth Circuit are more or less persuasive than those from any other Circuit. *Id.* Washington Courts are not bound under the doctrine of *stare decisis* to follow Ninth Circuit precedent. *Feis v. King County Sheriff's Dept.*, 165 Wn.App. 525, 547, 267 P.3d 1022 (2011). The trial court had no legal basis or rational reason to declare that the Ninth Circuit case of *Sandoval* overruled Washington case law, or was binding when other federal circuits' precedent was not. The trial court clearly erred in finding *Sandoval* applicable and binding. *Stare decisis* did not require the trial court to adhere to the Ninth Circuit's decision in *Sandoval* and the trial court erroneously believed it had to.

III. The trial court erred in finding Pippen had a reasonable expectation of privacy in a tarp structure attached to a guardrail located on public property on the side of a public road.

No reasonable person would have an expectation of privacy in a location where he is openly committing a crime on public property during daylight hours. The trial court erred in finding Pippen had an expectation of privacy underneath a tarp structure he had created on the side of a public road[1]. The trial court should be reversed.

This Court reviews a trial court's conclusions of law on a suppression motion *de novo*. *State v. Carter*, 151 Wn.2d 118, 125, 85 P.3d 887 (2004). The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures. Article I, section 7 of the Washington State Constitution provides that no person shall be disturbed in his private affairs without authority of law.

Warrantless searches are presumed unreasonable under both constitutions, unless the State shows that a search falls within an exception to the warrant requirement. *State v. Stroud*, 106 Wn.2d 144, 147, 720 P.2d 436 (1986). Under the Fourth Amendment protection, our Courts look to

[1] The trial court did not make it clear in its findings of fact and conclusions of law whether its analysis was exclusively based on the Fourth Amendment to the U.S. Constitution, or whether it also found the search violated Article I, section 7 of the Washington State Constitution. The State addresses each in turn, and argues the search was permissible under both the Fourth Amendment and Article I, section 7, and the trial court erred in either finding that it violated both the Fourth Amendment and Article I, section 7, and/or in failing to analyze the issue under the Washington State Constitution.

whether a person has a "reasonable expectation of privacy." *State v. Myrick*, 102 Wn.2d 506, 510, 688 P.2d 151 (1984); *see also Katz v. U.S.*, 389 U.S. 347, 361, 88 S.Ct. 507, 516, 19 L.Ed.2d 576 (1967). Under our State constitution, our Courts look to whether the governmental intrusion unreasonably intruded on a person's 'private affairs.' *Myrick,* at 510, 688 P.2d 151. The legitimacy of a privacy claim is evaluated by considering the totality of the circumstances. *Rakas v. Illinois*, 439 U.S. 128, 152, 99 S.Ct. 421, 435, 58 L.Ed.2d 387 (1978). The determination of what an individual has a reasonable expectation of privacy in is not based solely on whether that individual has chosen to conceal his activity, but is based on our personal and societal values and what the Fourth Amendment protects. *Oliver v. U.S.,* 466 U.S. 170, 182-83, 104 S.Ct. 1735, 1741, 80 L.Ed.2d 214 (1984).

Generally, a person does not have an expectation of privacy in a temporary shelter he wrongfully occupies on public property. *State v. Cleator*, 71 Wash. App. 217, 220-22, 857 P.2d 306, 307-09 (1993). When an individual is out in public, he does not reasonably have an expectation of privacy such as he would have in his own home or on private property, not in the public domain. This expectation is further reduced when an individual is engaged in criminal activity taking place in public. For example, in *State v. Ellison*, 172 Wn.App. 710, 291 P.3d 921 (2013), this

Court noted that a defendant who was trespassing on another person's property, to commit a crime, "should reasonably expect less Fourth Amendment protection when the police become involved." *Ellison*, 172 Wn.App. at 725, n. 8. Federal courts have long held that a squatter does not have a reasonable expectation of privacy in a place from which he could be ejected at any time. *See U.S. v. Ruckman*, 806 F.2d 1471, 1472-73 (10th Cir. 1986) (holding a squatter had no reasonable expectation in a cave from which he could be ejected) and *Amezquita v. Hernandez-Colon*, 518 F.2d 8, 11 (1st Cir. 1975) (holding a squatter had no reasonable expectation of privacy on land which he had no right to occupy). If a person openly leaves his belongings on public property, he cannot expect to retain his privacy in those items.

In *State v. Cleator*, this Court considered almost identical facts and found that the defendant had no Fourth Amendment privacy rights in a tent erected unlawfully on public property. The defendant there had set up a tent on public land without permission. *Cleator*, 71 Wn.App. at 222. The defendant had no right to remain on the property and could be ejected at any time. *Id.* Thus, the defendant had no reasonable expectation of privacy. *Id.* Pippen likewise had no reasonable expectation of privacy in the tarp structure he erected on the side of a public road in downtown Vancouver. The evidence is uncontested that Pippen had no right to be on

the land he was on, that it was unlawful for him to be camping there at the time that he was, and that he could be ejected. Further, like in *Cleator*, Pippen's tarp shelter was unsecured and it was a crime for the structure to be up when it was. *See* VMC 8.22.040.

"If an individual places his effects upon premises where he has no legitimate expectation of privacy (for example, in an abandoned shack or as a trespasser upon another's property), then he has no legitimate reasonable expectation that they will remain undisturbed upon [those] premises." *Cleator*, 71 Wn.App. at 221 (citing 4 W. LaFave, Search and Seizure § 11.3(c), at 305 (1987) (quoting M. Gutterman, "A Person Aggrieved": Standing to Suppress Illegally Seized Evidence in Transition, 23 Emory L.J. 111, 119 (1974))). It defies logic to believe a person who erects a makeshift tarp structure tied to a guardrail on the side of a road has a reasonable expectation of privacy in that structure to the same extent a person has an expectation of privacy in his home, which he lawfully occupies. In fact, in a similar circumstance, the First Circuit has called the idea that squatters on government land have a reasonable expectation of privacy "ludicrous." *Amezquita v. Hernandez-Colon*, 518 F.2d 9, 11 (1st Cir. 1975), *cert. denied*, 424 U.S. 916, 96 S.Ct. 1117, 47 L.Ed.2d 321 (1976)). In this vein, *Sandoval* is both distinguishable in its facts and

wrongly decided. As in *Glasmann*, *supra,* our State Courts do not need to agree with, and are not bound by, Ninth Circuit case law.

First, the facts in *Sandoval* differ in significant ways: while Pippen's tarp structure was erected on the side of a road in downtown, Sandoval's tent was erected in an area covered in vegetation that was virtually impenetrable. Also, in the *Sandoval* case, police knew the tent was empty and chose to search it, whereas in Pippen's case police knew he was in there and had probable cause he was committing the misdemeanor of unlawful camping. These significant differences affect the analysis under the Fourth Amendment. A person does not have a reasonable expectation of privacy when he chooses to unlawfully camp, violating the local code, on the side of a road in the downtown area of a city. Pippen had no reasonable expectation in his tarp structure at the time police contacted him. Further, one reason the *Sandoval* Court found the defendant retained an expectation of privacy was because the public land on which the defendant's tent was erected was not easily identifiable as a non-campsite and was not clearly off-limits. *Sandoval*, 200 F.3d at 661. The Court also focused on the fact that the defendant in *Sandoval* had never been instructed to vacate the premises. *Id.* These are two additional facts which differ in Pippen's case. Pippen erected his tarp structure on the side of a road in downtown. He tied one side of his tarp to a guardrail.

This was not in the wilderness amidst dense vegetation. The side of a public road next to a guardrail is clearly identifiable as a non-campsite and is clearly off-limits. This is especially so when there was a notice posted to the structure four days prior indicating the need to vacate, and identical notices posted in the area and on the fence by Pippen's structure. Again, different from the facts in *Sandoval*, Pippen had been notified of the need to vacate and the illegality of erecting a tent in that area. The *Sandoval* facts differ so significantly from those in Pippen's case that it is simply inapplicable. The trial court also incorrectly found that the police officers increased Pippen's expectation of privacy in his tarp structure by treating him, and others in his situation, with dignity. By being respectful and easing in to enforcing the unlawful camping ordinance, the police were reasonable and considerate. However, they gave notice of the need to vacate the area and to remove their belongings to Pippen and others in the area. Thus Pippen knew of the need to vacate, knew of the clean up to occur, and that he was on public land and committing a crime. The officers' actions only served to decrease Pippen's expectation of privacy. The trial court's finding that the officers' actions increased or created Pippen's expectation of privacy is erroneous.

Second, the *Sandoval* case was wrongly decided. The defendant had erected a tent on public property that was not a campground.

Sandoval, 200 F.3d at 661. The defendant was in a public place and was essentially squatting on property he did not own and upon which he did not have permission to stay. In such an instance, a person cannot objectively have a reasonable expectation of privacy. Any such expectation is simply unreasonable. The Ninth Circuit wrongly decided this issue.

It's worth noting in *Sandoval* that the Ninth Circuit believed that if a camper on a campsite overstayed his permit, then he would not lose his expectation of privacy in his campsite. However, our State case law holds to the contrary. Upon the expiration of tenancy, an absent hotel guest does not have a reasonable expectation of privacy in his rented room. *State v. Davis*, 86 Wn.App. 414, 419 n. 2, 937 P.2d 1110 (1997) (citing *State v. Roff*, 70 Wn.2d 606, 611-12, 424 P.2d 643 (1967); *U.S. v. Huffhines*, 967 F.2d 314, 318 (9th Cir. 1992) and *State v. Christian*, 95 Wn.2d 655, 660-61, 628 P.2d 806 (1981)). Again, our State courts disagree with the Ninth Circuit on many issues and are not bound by Ninth Circuit precedence.

The Tenth Circuit in *U.S. v. Ruckman*, 806 F.2d 1471 (1986) is in line with our State precedent. In *Ruckman*, the police searched a cave in a remote area that was on land owned by the United States. *Ruckman*, 806 F.2d at 1472. The search occurred at a time when the defendant was not in or near the cave in which he had been living. *Id.* There, the Tenth Circuit

found this cave did not fall under the protection of the Fourth Amendment as objectively, there could be no reasonable expectation of privacy in a cave on public land. *Id.*

The Court in *Ruckman* noted that the government has the rights of any proprietor, to maintain possession of its land and to prosecute trespassers. *Id.* (citing *U.S. v. Osterlund*, 505 F.Supp. 165, 167 (D.Colo. 1981), *aff'd*, 671 F.2d 1267 (10th Cir. 1982)). The City of Vancouver likewise has the rights of any landowner. The place upon which Pippen was found was City land and Pippen was a trespasser. Further, the City had an ordinance which prohibited daytime camping on City land and Pippen was actively and publicly violating this ordinance. When a person commits a misdemeanor in the presence of a police officer, that officer has the statutory right to arrest the person. RCW 10.31.100. Any expectation of privacy Pippen could have had was not reasonable in light of all the circumstances. Pippen was not on private property, he was on City land; Pippen was trespassing; Pippen had been given notice to vacate; Pippen was committing a crime. Pippen had no expectation of privacy and thus the Fourth Amendment's protections do not extend to the tarp structure he erected against a guardrail on the side of a road in downtown Vancouver.

The police's search also did not violate article 1 section 7 of the Washington State Constitution. An analysis under this section looks to

whether a person has a privacy interest that citizens have held or should be entitled to hold safe from governmental trespass. *Myrick*, 102 Wn.2d at 511. The relevant inquiry for determining when a search has occurred is whether the state unreasonably intruded into the defendant's "private affairs," not whether a person's expectation of privacy is reasonable. *State v. Boland*, 1115 Wn.2d 571, 587-88, 800 P.2d 1112 (1990). This inquiry focuses on those privacy interests in which citizens have held, and should be entitled to hold, safe from governmental trespass absent a warrant. *State v. Surge*, 160 Wn.2d 65, 71-72, 156 P.3d 208 (2007). There is no basis for a citizen to have unlimited privacy rights in property they wrongfully occupy. In this analysis, our precedent in *Cleator* answers this question clearly and decisively. In *Cleator*, *supra*, this Court found that the defendant did not have a privacy right in a tent erected on public land. *Cleator*, 71 Wn.App. at 223. An individual's private affairs are not intruded upon when an officer searches a tent unlawfully erected on public land. In *Cleator*, the officer lifted the flap of the tent and then entered to retrieve stolen property. *Id.* This limited look and entry did not intrude on the defendant's private affairs. *Id.* As in *Cleator*, the officers' actions in Pippen's case did not unreasonably intrude into Pippen's private affairs. The officers there lifted the edge of the tarp only after Pippen took an unreasonable amount of time to respond to the officers' requests to exit the

tarp structure. It was there, in open view, that officers saw the methamphetamine in Pippen's possession.

Pippen's Fourth Amendment right to be free from unreasonable search, and his article I, section 7 right to be free from governmental intrusion of his private affairs, were not violated by the officers' actions in lifting the tarp to see Pippen after he refused to exit in a timely fashion. The trial court improperly believed it was bound by Ninth Circuit precedent over other federal Circuits and our own state precedent. A review of the specific facts of Pippen's case show that he had no reasonable expectation of privacy and that his privacy was not unduly invaded. The trial court should be reversed.

IV. The trial court erred in finding the officers' did not have a reasonable basis due to officer safety concerns to lift the edge of the tarp to look underneath.

Officers need not wait to be accosted or assaulted before a brief, protective, search of a person's private affairs is done. The officers involved in contacting Pippen, reasonably feared for their safety after Pippen failed to show himself and the officers heard rustling and movement from underneath the tarp structure. The trial court erred in finding that the defendant's privacy interest outweighed the officers' concern for their safety. The plain view exception to the warrant requirement permitted the officers' seizure of the methamphetamine they

found in Pippen's possession. The trial court erred in suppressing this evidence and its ruling should be reversed.

If this Court finds Pippen did have a privacy interest in the tarp structure, then the officers' brief, limited search of it was warranted under the protective sweep exigency exception to the warrant requirement. A protective sweep is a "quick and limited search of a premise, incident to an arrest and conducted to protect the safety of police officers and others." *Maryland v. Buie*, 494 U.S. 325, 327, 110 S.Ct. 1093, 1094, 108 L.Ed.2d 276 (1990). If an officer reasonably believes, based on articulable facts, that the area to be "swept" harbors an individual posing a danger to the officers, then a "protective sweep" is warranted and reasonable. *Id.* at 334. As was done here, a cursory inspection of an area in which someone could be found is permissible.

In *U.S. v. Rigsby*, 943 F.2d 631 (6th Cir. 1991), the Court held that police had a reasonable belief that a tent, or someone hiding in the tent, posed a danger to them. Thus the Court found the officers' cursory search of the tent, by lifting the flap of the tent and looking inside, was a reasonable protective sweep that was justified for officer safety. *Rigsby*, 943 F.2d at 637. The facts in Pippen's case are substantially similar to *Rigsby*. Police came upon Pippen's tent, and thus had probable cause that any person inside the tent was violating Vancouver Municipal Code. The

officers called out to Pippen multiple times and instructed him to exit the tent; he failed to comply. The officers waited, and still Pippen did not comply. The officers then heard rustling and movement underneath the tarp structure, and they could not see what the individual inside the tent was doing. Fearing for their safety, one officer lifted the bottom of the tarp to peer inside. This cursory inspection to protect their safety was entirely reasonable and lawful.

Officers may take necessary precautions to protect themselves from potentially dangerous situations, and it is unreasonable to prevent these officers from taking reasonable steps to protect themselves. *City of Seattle v. Hall*, 60 Wn.App. 645, 652, 806 P.2d 1246 (1991); *Michigan v. Long*, 463 U.S. 1032, 1052 n. 16, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983). After Pippen refused to comply with the police officers' directions to exit the tent, the officers had a valid basis to protect themselves. Upon hearing rustling and movement from within the tarp structure, it was entirely reasonable for the police officers to fear for their safety and worry about what Pippen may be doing. Officers have a dangerous job in which their safety is often at risk. What the officers did here to dispel their fears and provide for their safety was conservative and reasonable. The officer lifted the edge of the tarp to determine whether Pippen was arming himself or doing anything that may put the officers in danger. This minimal intrusion

was warranted for the officers' safety. Pippen's privacy interest did not outweigh the officers' safety. As the officers' intrusion was justified, the evidence they found was admissible under the plain view exception.

The plain view exception to the warrant requirement permits a warrantless seizure of incriminating evidence that was discovered during a legitimate intrusion into an individual's privacy. *Coolidge v. New Hampshire*, 403 U.S. 443, 465, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). The plain view exception requires certain factors be met: "(1) a prior justification for police intrusion—whether by warrant or by a recognized exception to the warrant requirement; (2) an inadvertent discovery of incriminating evidence; and (3) immediate knowledge by police that they have evidence before them." *State v. Lair*, 95 Wn.2d 706, 714, 630 P.2d 427 (1981). Here, all three factors are met. The police intrusion was justified for officer safety reasons. The discovery of the methamphetamine was inadvertent in that it was in plain view when the officer lifted the edge of the tarp in order to see Pippen to determine whether he posed a present danger to the officers. And finally, the nature of the methamphetamine was immediately apparent to the officers.

The trial court erred in finding the officers' legitimate safety concern was outweighed by Pippen's privacy interest in the tarp structure he erected on the side of a public road in downtown Vancouver. The trial

court's order suppressing the evidence should be reversed and the matter should be remanded for trial.

CONCLUSION

Pippen had no reasonable expectation of privacy in a tarp structure he erected on the side of a public road, on public property, in downtown Vancouver. The trial court erred in finding Pippen had an expectation of privacy and that the search of the tarp structure was unlawful. The trial court's order suppressing evidence should be reversed.

DATED this 8th day of July, 2016.

Respectfully submitted:

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